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IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1968

No. 566

PAUL SULGER,

Petitioner,

vs.

B. H. POCHYLA, CONSTANCE POCHYLA, THOMAS A. RYAN, and KATHERINE RYAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

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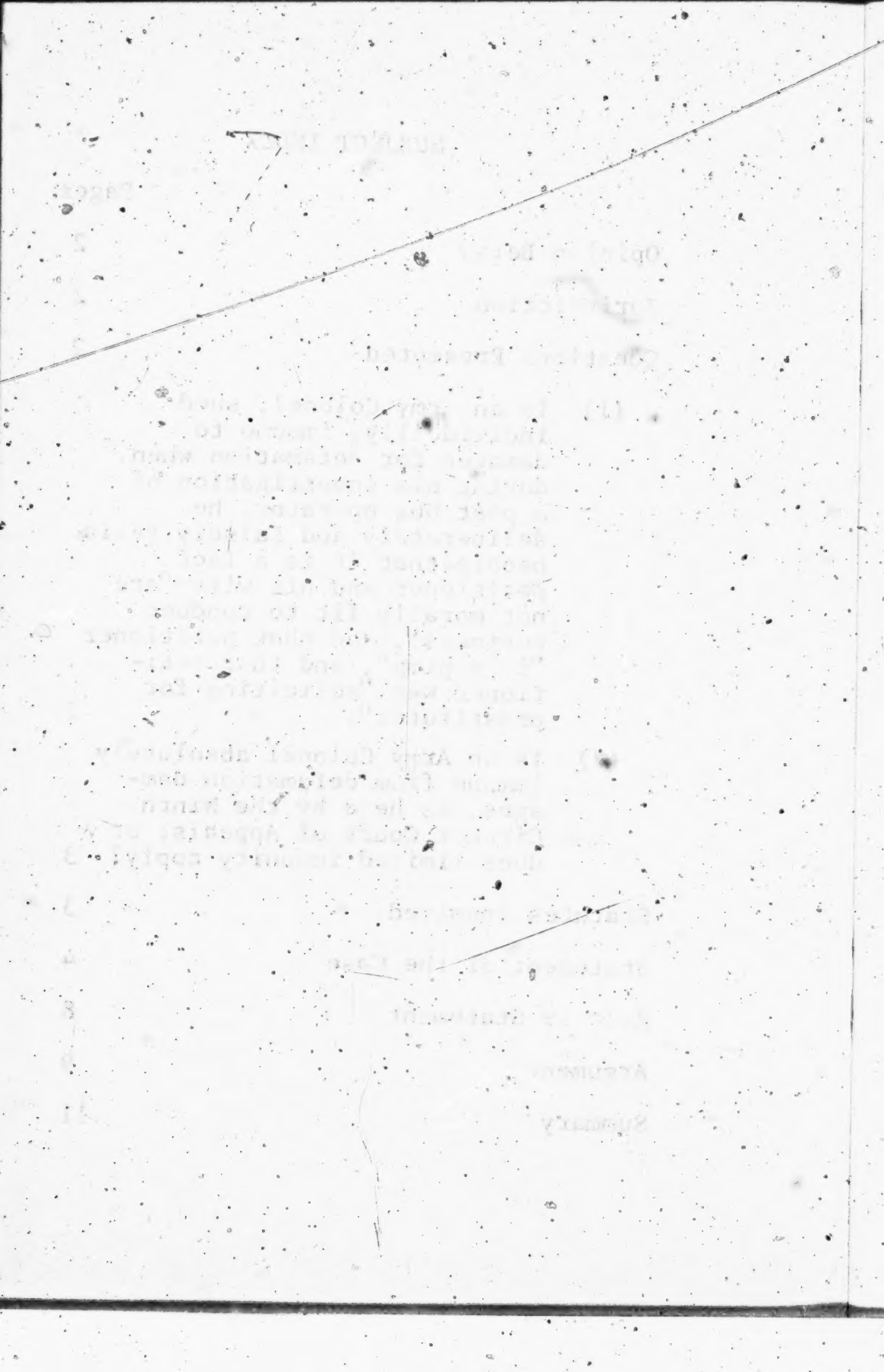

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered and entered

June 26, 1968.

JURISDICTION

On January 17, 1967, the United States District Court for the District of Arizona rendered and entered its summary judgment against petitioner and in favor of respondents. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which on June 26, 1968, rendered and entered its decision and judgment affirming the said summary judgment. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254, Subsection 1. (Appendix C). The decision of the Ninth Circuit Court of Appeals is in Appendix B.

QUESTIONS PRESENTED

(1) Is an Army Colonel, sued individually, immune to damages for defama-

tion when, during his investigation of a post bus operator, he deliberately and falsely tells people that it is a fact petitioner and his wife "are not morally fit to conduct business", and that petitioner "is a pimp", and that petitioner was "soliciting for prostitutes".

(2) Is an Army Colonel absolutely immune from defamation damages, as held by the Ninth Circuit Court of Appeals; or does limited immunity apply under the rule of Ampey v. Thornton, 65 Fed.Supp. 216, Maryland v. Soper, 270 U.S. 9, Colorado v. Symes, 286 U.S. 510, People's U. S. Bank v. Goodwin, 162 Fed. 937, 945.

STATUTES INVOLVED

The case involves 28 U.S.C. Rules of Civil Procedure, Rule 56(b).

STATEMENT OF THE CASE

Respondent Thomas A. Ryan, a colonel, United States Army, was the Staff Judge Advocate of and at the Army Electronic Proving Grounds at Fort Huachuca. Petitioner operated at the post his taxi and bus business under a license from the Arizona Corporation Commission. The post commanding general in late 1964 and 1965 directed Col. Ryan to cause to be commenced a license revocation proceeding against petitioner before the Arizona Corporation Commission.

Meanwhile, according to the undenied affidavit of one William Stone, respondent Col. Ryan in May 1965 at Sierra Vista, Arizona, stated to Stone that:

> "Mr. Sulger and his wife are not morally fit to conduct business ...; ... that Paul Sulger was soliciting for prostitutes and that Paul Sulger was a 'pimp' ...". (62 Transcript).

According to the undenied affidavit

of one Rex Thornton, the same respondent Col. Ryan telephoned him in May 1965 and said that:

> "... Paul Sulger and his wife were morally unfit ..." (63 Transcript).

(Neither defamatory occasion was a proceeding before the Arizona Corporation Commission.)

Petitioner on May 2, 1966, filed an action against Col. Ryan and also against his superior, General Pochyla, and their wives, in respect to the foregoing out-of-court slanders, in the Superior Court of the State of Arizona. (10-16 Transcript). The Third Claim for damages for defamation therein was in essence that Col. Ryan personally and as agent for Gen. Pochyla, "in many instances prior to and subsequent" to May 1965, said that:

> "... Paul Sulger, on numerous occasions in Sierra Vista, openly and notoriously solicited transportation

> "for hire to carry members of the United States Army stationed at Fort Huachuca for illicit and immoral purposes ..." (11-12 Transcript).

Petitioner alleged and prayed for actual and punitive damages. (17 Transcript).

The action was removed under 28 U.S.C. Section 1442 to the United States District Court for the District of Arizona, Civil No. 2184 - Tuscon. (5-6 Transcript). Respondents on May 20, 1966, filed therein their unverified general denial, except that they did admit that one occasion of the defamation utterances was a pleading in the Arizona Corporation Commission case "filed by defendant Thomas A. Ryan at the direction of defendant B. H. Pochyla," and for affirmative defense, that the two officers were acting in the discharge of their official duties. (18-21 Transcript). On July 6, 1966, respondents filed a motion for summary judgment under Rule 56(b), 28 U.S.C.,

Rules of Civil Procedure. (47-59 Transcript). Colonel Ryan filed his supporting affidavit that "any and all statements that I have ever made concerning Mr. Sulger ... were made by me in my official capacity as officer of the United States Army." (37-44 Transcript).

In response to the motion for summary judgment, petitioner filed the affidavits of Stone and of Thornton, before mentioned. (59-65 Transcript, esp. 62, 63).

On January 17, 1967, the United States District Court granted the motion for summary judgment and dismissed the action. (82, 96-97 Transcript).

Petitioner duly filed his Notice of Appeal therefrom. (Docket, 97 Transcript). The Ninth Circuit Court of Appeals subsequently affirmed the orders granting the motion for summary judgment and dismissal of the action. (Decision, Appendix

B; appellate court judgment, Appendix A), on June 26, 1968.

RULE 19 STATEMENT

The special and important reasons for a review on writ of certiorari are as follows:

(1) The "outer perimeter" allowed government officers by this Court of Appeal decision is so broad that it provides in practice absolute immunity to government officers; and

(2) The Court of Appeals decision expressly holds that the statements of army officers are absolutely privileged. ("We hold that the statements made were absolutely privileged.")

(a) Such holding is in direct conflict upon such federal question with applicable decisions of this court, Maryland v. Soper, 270 U.S. 9, and Colorado

v. Symes, 286 U.S. 510, and the "outer perimeter" rule of Barr v. Mateo, 360 U.S. 564, and upon an issue which ought to be settled, namely;

(b) Is the "outer perimeter" rule to be used to blanket torts of government officers which are clearly neither official acts of such officers nor justified at all by their duties?

ARGUMENT

I. The out-of-court slanders here were clearly beyond the outer perimeter of the officer's duties.

No need to investigate could ever justify, or suggest to any officer reasonably trying to do his duty, that he had a right to tell people gratuitously that petitioner was in fact a pimp, a soliciter of women, and morally unfit for business, (not just the tax business, but

any business at all).

In Ampey v. Thornton, 65 Fed.Supp. 216, an F.B.I. special agent was attempting to locate a criminal defendant for whom the F.B.I. agent held an arrest warrant. He inquired of the plaintiff as to the whereabouts of the person,

> "... to which plaintiff replied in the negative, and then in the presence of third persons defendant said to plaintiff, 'You are a bitch.' ..."

It was held that calling plaintiff a "bitch" was clearly not part of the official duties of this F.B.I. investigator, and that his official duties were no justification thereof.

II. The Court of Appeals decision here misconstrues Barr v. Matteo.

The Barr cae, 360 U.S. 564, did use the now-famous "outer perimeter" rule; but implicitly, there is a perimeter, and the gratuitous slanders made by these officers, especially Col. Ryan, were clearly

within any such outer perimeter. The fact that Col. Ryan is held by the Court of Appeals decision to have been "interviewing potential witnesses", should not give him carte blanche to say any vicious thing he desires about petitioner.

SUMMARY

For the reasons given, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, San Francisco, California.

June 18, 1968.

Respectfully submitted,

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(Appendices A, B and C follow.)